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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TEDDY LAWRENCE DREHER,

Defendant and Appellant.

H024569

(Santa Clara County
Super. Ct. No. CC121269)

Defendant Teddy Lawrence Dreher appeals after pleading no contest to buying or receiving a stolen motor vehicle (Pen. Code, § 496d) and using or being under the influence of methamphetamine (Health & Saf. Code, § 11550, subd. (a)). Defendant admitted that he had served four prior prison terms (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to a four-year prison term.

On appeal, defendant claims that when he relieved his retained counsel at sentencing, the trial court should have provided defendant an opportunity to obtain new trial counsel to help him present a motion to withdraw his plea and to represent him during sentencing. We agree. Therefore we will reverse the judgment and remand the case.

I. BACKGROUND

The facts underlying the offenses of which defendant was convicted are not relevant to the issues raised on appeal. Defendant was charged, by information, with vehicle theft with a prior vehicle theft conviction (count 1, Pen. Code, § 666.5, Veh. Code, § 10851, subd. (a)), buying or receiving a stolen motor vehicle (count 2, Pen. Code, § 496d) and using or being under the influence of methamphetamine (count 3, Health & Saf. Code, § 11550, subd. (a)). The information alleged that defendant had served four prior prison terms (Pen. Code, § 667.5, subd. (b)).

On April 8, 2002, defendant, while represented by retained counsel, changed his plea pursuant to a negotiated disposition. Defendant pled no contest to counts 2 and 3 and admitted the four prior prison term allegations. The People agreed to recommend defendant be committed to a state medical facility. Pursuant to the agreement, the trial court was to impose the upper term of three years for count 2 and a consecutive one-year term for one of the prior prison term allegations. The term for count 3 was to run concurrently with count 1, and the other three prior prison term allegations would be suspended.

On May 10, 2002, defendant appeared for sentencing, with retained counsel. The trial court noted that the sentencing hearing had been continued from the previous week, when defendant indicated that he was “not prepared to proceed” and that he had “relieved [trial counsel] of his duties.” The trial court said that it would allow defendant to explain why the sentencing hearing should be further delayed.

The prosecutor asked if he should leave the courtroom. The trial court noted, “this is not a *Marsden* hearing because [trial counsel] as I understand it was privately retained.”¹ The trial court reiterated that the hearing would concern only the issue of why the sentencing hearing should be postponed.

¹ See *People v. Marsden* (1970) 2 Cal.3d 118.

Defendant then stated, “Your Honor, I’d like to ask for a *Marsden* motion at this time because [trial counsel] hasn’t represented me to his fullest.” The trial court told defendant, “I could not give you a *Marsden* motion with regard to [trial counsel] because he is not appointed counsel.” The trial court informed defendant that he was entitled to “terminate [trial counsel’s] services at any time.” Defendant then requested a referral to the public defender’s office. He asserted that he had not received a copy of the police report or the complaint and that trial counsel had misled him.

The trial court reminded defendant that he had pleaded no contest to the charges, waived his rights, and indicated that he understood the consequences of his plea. Defendant again asserted that trial counsel had misled him and stated that he wished to “pull my plea and exercise my right to a jury trial.”

At that point, the trial court asked the prosecutor to leave the room and conducted an in camera hearing. Defendant reiterated his complaint about trial counsel failing to give him the complaint and police reports. Defendant also complained that trial counsel had told him that his prior convictions would be admitted at trial regardless of whether he testified. Defendant requested he be permitted to relieve trial counsel and exercise his right to a jury trial. He asserted that he entered into the plea bargain because he felt “scared” and “pressured.”

The trial court stated, “I’m going to deny your request to continue the sentencing today. I’m going to find that [at] the proceedings on April the 8th you were adequately notified of your rights” Defendant requested “to have an appellate attorney appointed to me on this decision.” The trial court told defendant, “that’s something you’ll have to take up separately. Today what I’m doing is sentencing.”

After the in camera hearing, the trial court asked defendant whether he wished to have trial counsel represent him at the sentencing hearing. Defendant said he did not. The trial court informed trial counsel that he was free to leave at that point. Defendant was not represented by counsel for the remaining of the hearing.

The trial court asked defendant if there was any reason why it should not impose sentence at that time. Defendant said, “Yes,” and explained, “I’ve had inadequate counsel up to this point, and I was pressured into taking this deal.” The trial court responded that it found defendant’s proffered reasons for continuing the sentencing hearing to be “inadequate” and refused to continue the hearing. Defendant stated, “I would like to have an attorney. I have no idea what I’m doing here” The trial court continued on with the sentencing hearing without responding to defendant’s request.

After a discussion of the probation report’s calculation of defendant’s custody credits, defendant stated, “I’d like to withdraw my plea.” The trial court replied, “That’s a different motion and that’s not a motion in front of me today and that’s not a motion I’m going to hear at this time.” The trial court then imposed sentence in accordance with the negotiated disposition.

II. DISCUSSION

Defendant claims that when he relieved his retained counsel at sentencing, the trial court should have appointed new counsel to help him present a motion to withdraw his plea and to represent him during sentencing.

The People concede that defendant was entitled to counsel during the sentencing hearing and that the trial court should have granted a continuance to permit defendant to obtain new counsel.² However, the People dispute that defendant was entitled to counsel in order to present a motion to withdraw his plea. They suggest we conditionally reverse the judgment for resentencing only.

Defendant relies on this court’s opinion in *People v. Brown* (1986) 179 Cal.App.3d 207 (*Brown*). In *Brown*, the defendant pleaded nolo contendere to two counts of committing a lewd and lascivious act on a child, pursuant to an agreement with

² Defendant asks us to order the trial court to *appoint* new counsel. However, the determination whether defendant qualifies for appointed counsel is a matter for the trial court. (See Pen. Code, § 987.)

the prosecution. At sentencing, trial counsel informed the trial court that the defendant wanted to withdraw his plea, but that she was not making the motion for him. The defendant asked the trial court if he could withdraw his plea and obtain another attorney, but the trial court refused to grant either request.

This court concluded that the defendant was “deprived of his right to make an effective motion to withdraw his plea of nolo contendere.” (*Brown, supra*, 179 Cal.App.3d at p. 213.) We explained that it was “improper to permit defendant to bring his motion in pro. per. while he was still represented by counsel and he had not waived his right to counsel. [Citation.]” (*Id.* at pp. 214-215.) We noted that the defendant’s motion to withdraw his plea was not frivolous, and therefore trial counsel should not have refused to bring it. We remanded the case to allow the defendant to bring a motion to withdraw his plea and directed the trial court to hold a *Marsden* hearing if trial counsel still refused to present the motion.

Brown was followed in *People v. Osorio* (1987) 194 Cal.App.3d 183. There, the defendant stated that he wanted to withdraw his plea at sentencing. Trial counsel indicated that there was good cause for a motion to withdraw the plea, but refused to bring such a motion because it would result in reinstatement of counts dropped under the plea bargain. On appeal, the defendant requested the case be remanded so that he could file a motion to withdraw his plea. Following *Brown*, the court agreed that it was appropriate to do so.

Here, as in both *Brown* and *Osorio*, defendant was denied the right to have counsel present a motion to withdraw his plea.³ We believe it is appropriate to remand the case to permit defendant to obtain new counsel to investigate whether good cause exists for a

³ Contrary to the People’s assertion, defendant was not required to file a written motion to withdraw his plea in order to preserve his claim under these circumstances. (See *People v. Garcia* (1991) 227 Cal.App.3d 1369, 1367-1377, disapproved on other grounds in *People v. Smith* (1993) 6 Cal.4th 684, 694.)

motion to withdraw defendant's no contest plea. (See Pen. Code, § 1018.) New counsel shall present such a motion if, in his or her "good faith opinion," such a motion would not be "frivolous" nor "compromise accepted ethical standards." (*Brown, supra*, 179 Cal.App.3d at p. 216.) If defendant declines to bring a motion to withdraw his plea or such motion is denied, defendant shall be resentenced.

III. DISPOSITION

The judgment is reversed and the matter is remanded in order for defendant to obtain new counsel, to file a motion to withdraw his plea of no contest, and for resentencing if defendant declines to file a motion to withdraw the plea or if such motion is denied.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

WUNDERLICH, J.

MIHARA, J.